COURT OF APPEAL FOR ONTARIO

CITATION: The Catalyst Capital Group Inc. v. VimpelCom Ltd., 2019 ONCA 354
DATE: 20190502
DOCKET: C65431

Tulloch, Benotto and Huscroft JJ.A.

BETWEEN

The Catalyst Capital Group Inc.

Plaintiff (Appellant)

and

VimpelCom Ltd., Globalive Capital Inc., UBS Securities Canada Inc., Tennenbaum Capital Partners LLC, 64NM Holdings GP LLC, 64NM Holdings LP, LG Capital Investors LLC, Serruya Private Equity Inc., Novus Wireless Communications Inc., West Face Capital Inc. and Mid-Bowline Group Corp.

Defendants (Respondents)

John E. Callaghan, Benjamin Na, Matthew Karabus, and David C. Moore, for the appellant

Orestes Pasparakis and Danny Urquhart, for the respondent VimpelCom Ltd.

James D.G. Douglas, Caitlin R. Sainsbury, and Graham Splawski, for the respondent Globalive Capital Inc.

Daniel S. Murdoch, for the respondent UBS Securities Canada Inc.

Michael Barrack, Kiran Patel, and Daniel Szirmak, for the respondents Tennenbaum Capital Partners LLC, 64NM Holdings GP LLC, 64NM Holdings LP and LG Capital Investors LLC

Lucas Lung, for the respondent Serruya Private Equity Inc.

Geoff R. Hall, for the respondent Novus Wireless Communications Inc.

Kent Thomson and Matthew Milne-Smith, for the respondent West Face Capital Inc.

Heard: February 19 and 20, 2019

On appeal from the judgment of Justice Glenn A. Hainey of the Superior Court of Justice, dated April 18, 2018, with reasons reported at 2018 ONSC 2471.

Tulloch J.A.:

OVERVIEW

[1] This case arises out of the failed attempt by the appellant, The Catalyst Capital Group Inc. ("Catalyst"), to purchase WIND Mobile Corp. ("Wind"). After its attempt to purchase Wind failed, Catalyst sued the respondents claiming more than $1 billion in damages. The motions judge dismissed the action on the basis of issue estoppel, cause of action estoppel, and abuse of process.

[2] Catalyst appeals. For the reasons that follow, I would dismiss the appeal.

FACTS

(1) Background

[3] Wind is a Canadian telecommunications provider. From 2011 to 2014, it was owned by the respondents VimpelCom Ltd. ("VimpelCom") and Globalive Capital Inc. ("Globalive"). VimpelCom held the majority of the total equity and Globalive held the majority of the voting equity.

[4] In 2013, VimpelCom announced its intention to sell its interest in Wind. Catalyst began negotiating with VimpelCom to purchase that interest. The respondent UBS Securities Canada Inc. ("UBS") advised VimpelCom in these negotiations.

[5] The negotiations proceeded over many months and gave rise to two agreements. On March 22, 2014, Catalyst and VimpelCom negotiated a Confidentiality Agreement providing that the existence and content of their negotiations were confidential. On July 23, 2014, Catalyst and VimpelCom signed an Exclusivity Agreement pursuant to which VimpelCom could negotiate only with Catalyst and could not solicit other bids. The exclusivity period under this agreement expired on August 18, 2014.

[6] By August 11, 2014, a deal seemed imminent. However, on this date, VimpelCom advised Catalyst that it wanted a $5 million to $20 million break fee and insisted on shortening the regulatory approval period for the deal from three months to two months. Catalyst refused to agree to these demands and ceased negotiations. The negotiations between Catalyst and VimpelCom proved unsuccessful. The exclusivity period expired on August 18, 2014 without a deal.

[7] After the exclusivity period expired, a group of purchasers (the "Consortium") successfully purchased VimpelCom's interest in Wind. The Consortium concluded the deal within a month of the exclusivity period's expiry. The Consortium had

made an unsolicited purchase proposal to VimpelCom on August 6, 2014. VimpelCom did not respond to the proposal until the exclusivity period under its Exclusivity Agreement with Catalyst expired. The members of the Consortium included the respondents West Face Capital Inc. ("West Face"), Tennenbaum Capital Partners LLC ("Tennenbaum"), 64NM Holdings LP ("64NM LP"), 64NM Holdings GP LLC ("64NM GP"), LG Capital Investors LLC ("LG"), Serruya Private Equity Inc., and Novus Wireless Communications Inc. Globalive was not initially part of the Consortium but joined the Consortium following the expiry of the exclusivity period on August 18, 2014.

(2) Commencement of the Moyse Action

[8] Brandon Moyse ("Moyse"), a junior analyst at Catalyst, left Catalyst and began working for West Face during the course of Catalyst's negotiations with VimpelCom. He resigned from Catalyst after the signing of the Confidentiality Agreement but before the conclusion of the Exclusivity Agreement. Catalyst commenced an action against Moyse and West Face (the "Moyse Action") to enforce the non-competition clause in Moyse's employment contract with Catalyst prior to the failure of Catalyst's bid to acquire Wind.

[9] Following the Consortium's purchase of VimpelCom's interest in Wind, Catalyst broadened the scope of the Moyse Action. It amended its statement of claim to allege that Moyse had communicated confidential information to West

Face about Catalyst's acquisition strategy with respect to Wind. Catalyst alleged that West Face used the confidential information it received from Moyse to successfully acquire Wind from VimpelCom. The amendments included a claim for a constructive trust over West Face's interest in Wind.

(3) Plan of Arrangement Proceedings

[10] Not long after acquiring Wind, the Consortium agreed to sell the company to Shaw Communications in December 2015. The sale proceeded by a plan of arrangement under s. 182 of the *Business Corporations Act*, R.S.O. 1990, c. B.16, to enable Shaw to obtain clear title to Wind's shares notwithstanding Catalyst's constructive trust claim. Catalyst opposed the plan because it would release the constructive trust claim.

[11] In his decision on the plan of arrangement, reported as *Re Mid-Bowline Group Corp.*, 2016 ONSC 669, Newbould J. made several adverse findings against Catalyst:

1) Catalyst deliberately delayed its claim against West Face to prevent it from selling its shares (para. 33);
2) Catalyst knew the facts underlying its claim for inducing breach of contract in March 2015 but only mentioned this claim for the first time in oral argument at the plan of arrangement hearing in January 2016 (paras. 52, 56);

3) Catalyst acted in bad faith by choosing to "lie in the weeds" until the hearing of the plan of arrangement application and then springing the "new theory" of inducing breach of contract (para. 59).

[12] Newbould J. did permit Catalyst to pursue a mini-trial of its constructive trust claim in the plan of arrangement proceedings. However, he declined to permit Catalyst to advance its claim for inducing breach of contract in this mini-trial. Catalyst ultimately declined to pursue a mini-trial, and Newbould J. approved the plan of arrangement on February 3, 2016.

[13] In early February 2016, following the revelation of Catalyst's intention to bring a claim for inducing breach of contract, counsel for West Face explicitly invited Catalyst to amend its pleadings in the Moyse Action to include such a claim if Catalyst in fact intended to pursue it. Catalyst declined to do so. The parties to the Moyse Action proceeded to schedule trial dates for June 2016.

(4) Commencement of Current Action

[14] Five days before the trial in the Moyse Action was to begin, Catalyst issued its statement of claim against West Face and the other respondents to the current action (the "Current Action") alleging breach of contract, breach of confidence, conspiracy, and inducing breach of contract. Counsel for West Face immediately wrote to Catalyst's counsel, asserting that the Current Action was litigation by

installment and an abuse of process. Catalyst did not take any steps in response to this protest and instead proceeded to trial in the Moyse Action.

(5) Decisions in the Moyse Action

[15] In reasons reported at 2016 ONSC 5271, 35 C.C.E.L. (4th) 242 ("Moyse Trial Reasons"), Newbould J. found that Catalyst had failed to make out each of the three elements of the breach of confidence claim. First, Moyse did not communicate any confidential information about Catalyst's acquisition strategy to West Face. Second, West Face made no use of such information in acquiring Wind. Third, even if West Face made use of Catalyst's confidential information, Catalyst suffered no detriment.

[16] Newbould J.'s findings on the detriment requirement of the breach of confidence cause of action are most relevant to this appeal. First, Newbould J. found that it was Catalyst's failure to agree to the break fee that VimpelCom requested that caused Catalyst to cease negotiations with VimpelCom: para. 130. Second, Newbould J. found that there was "no chance" that Catalyst could have closed the deal with VimpelCom because Catalyst insisted on making the deal conditional on receiving regulatory concessions from Industry Canada, a condition VimpelCom was unwilling to agree to: para. 131.

[17] In reasons reported at 2018 ONCA 283, 130 O.R. (3d) 675 ("Moyse ONCA Reasons"), this court dismissed Catalyst's appeal. This court rejected Catalyst's

attack on Newbould J.'s factual findings. Contrary to Catalyst's submissions, this court found that Catalyst was free to amend its pleadings in the Moyse Action to include a claim for inducing breach of contract but elected not to do so: para. 40. Similarly, this court noted that evidence pertaining to the dealings between VimpelCom, on the one side, and West Face and the Consortium on the other was relevant to Catalyst's claim and West Face's defence that it pursued its own strategies to purchase the Wind shares. The court noted that Catalyst did not object to any of this evidence at trial: paras. 41-42. The Supreme Court dismissed Catalyst's application for leave to appeal: [2018] S.C.C.A. No. 295.

(6) Decision of the Motions Judge: 2018 ONSC 2471

[18] The respondents in the Current Action moved to dismiss Catalyst's claims. Following this court's dismissal of Catalyst's appeal in the Moyse Action, the motions judge released comprehensive reasons dismissing Catalyst's claim ("Motions Reasons"). The motions judge dismissed the claim on the basis of issue estoppel and cause of action estoppel against VimpelCom and Globalive, as well as against Tennenbaum, 64NM LP, 64NM GP, and LG (the "US Investors"). While Globalive and the US Investors were not parties to the Moyse Action, the motions judge found that they were privies of West Face. The motions judge also dismissed Catalyst's claim against all respondents as an abuse of process. Finally, the motions judge struck Catalyst's claim of breach of contract against Globalive and UBS without leave to amend.

[19] First, the motions judge applied issue estoppel to dismiss the claim against VimpelCom, Globalive, and the US Investors because he found that Catalyst was trying to re-litigate the issue of why Catalyst failed to acquire Wind from VimpelCom. For the motions judge, Catalyst's claim was premised on a new theory that the Consortium conspired to induce VimpelCom to insist on a break fee condition that it knew Catalyst would reject. Newbould J., however, had found that Catalyst had no chance of concluding the deal. He found that there was no evidence that the Consortium's bid played any part in VimpelCom's decision to request a break fee, and that it was VimpelCom's refusal to agree to making the purchase conditional on receiving regulatory concessions that made a deal impossible. Thus, for Catalyst to succeed in the Current Action, the court would have to make a finding inconsistent with that of Newbould J. The motions judge declined to exercise his residual discretion not to apply issue estoppel because Catalyst was not entitled to a "second bite at the cherry": para. 75.

[20] Second, the motions judge applied cause of action estoppel to dismiss the claim against VimpelCom, Globalive, and the US Investors because he concluded that Catalyst's claims in the Moyse Action and the Current Action arose from the same set of facts. The motions judge identified those facts as Catalyst's failure to acquire Wind and Wind's subsequent acquisition by the Consortium. Newbould J. determined this issue against Catalyst in the Moyse Action. While Catalyst advanced a new theory of liability in the Current Action, it could have and should

have advanced this theory in the Moyse Action. Newbould J.'s ruling in the plan of arrangement proceedings did not bar it from doing so.

[21] Third, the motions judge dismissed Catalyst's claims against all the respondents as an abuse of process because he found that Catalyst was attempting to re-litigate why its bid failed. He stressed two factors: first, Catalyst could have advanced its claims from the Current Action in the Moyse Action; and second, for Catalyst to succeed in the Current Action, the court would have to make factual findings inconsistent with those of Newbould J.

[22] Finally, the motions judge struck Catalyst's claim for breach of contract against Globalive and UBS without leave to amend. He found that Catalyst had failed to plead the required elements of a breach of contract claim because it failed to plead that Globalive and UBS were parties to the Exclusivity Agreement and the Confidentiality Agreement. He declined leave to amend because Catalyst had many opportunities to properly plead its breach of contract claim and no amendment could produce a viable cause of action.

ISSUES

[23] The following issues arise on this appeal:

1) Did the motions judge err in dismissing the Current Action on the ground of issue estoppel?

2) Did the motions judge err in dismissing the Current Action on the ground of cause of action estoppel?
3) Did the motions judge err in dismissing the Current Action as an abuse of process?
4) Did the motions judge err in striking Catalyst's pleadings of breach of contract against UBS and Globalive without leave to amend?

ANALYSIS

Standard of Review

[24] This court owes deference to the motions judge's application of the tests for issue estoppel, cause of action estoppel, and abuse of process. As the Supreme Court held in *Penner v. Niagara (Regional Police Services Board),* 2013 SCC 19, [2013] 2 S.C.R. 125, at para. 27, the decision to apply issue estoppel is discretionary. Accordingly, an appellate court should intervene only if the motions judge misdirected himself, came to a decision that is so clearly wrong as to be an injustice, or gave no or insufficient weight to relevant considerations. This same standard of review applies to the application of the tests for cause of action estoppel and abuse of process: *Law Society of Manitoba v. Mackinnon*, 2014 MBCA 28, 370 D.L.R. (4th) 385, at para. 31; *Burcevski v. Ambrozic*, 2011 ABCA 178, 505 A.R. 359, at paras. 7-9, leave to appeal refused, [2011] S.C.C.A. No. 388.

I agree with the respondents that Catalyst has not pointed to an extricable error of law that would justify applying the correctness standard.

(1) Did the motions judge err in dismissing the Current Action on the ground of issue estoppel?

(a) The Law

[25] In *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460, at para. 25, the Supreme Court outlined the three requirements for issue estoppel:

1) The same question has been decided;

2) The judicial decision said to give rise to the estoppel is final; and

3) The parties to the judicial decision or their privies were the same persons as the parties to the proceeding in which the estoppel is raised or their privies.

Even if all three requirements are met, however, the court still has a residual discretion not to apply issue estoppel when its application would work an injustice: *Danyluk*, at paras. 62-63.

[26] The second and third of these requirements were not seriously contested in this court. Catalyst's only argument on the third requirement is that parties can only be privies if the same question is involved in both proceedings. Catalyst does not argue that, should this court find that the same question is involved in both

proceedings, the US Investors and Globalive were insufficiently connected to West Face to be its privies. Accordingly, the focus of these reasons is on the first requirement, that the question decided in the two proceedings be the same, as well as on the residual discretion.

[27] Different causes of action may have one or more material facts in common. Issue estoppel prevents re-litigation of the material facts that the cause of action in the prior action embraces: *Danyluk*, at para. 54. However, the question out of which the estoppel arises must be "fundamental to the decision arrived at" in the prior proceedings: *Angle v. M.N.R.*, [1975] 2 S.C.R. 248, at p. 255. Accordingly, the question must be "necessarily bound up" with the determination of the issue in the prior proceeding for issue estoppel to apply: *Danyluk*, at paras. 24, 54.

[28] Catalyst argues that the motions judge erred in applying issue estoppel for the following reasons:

1) Newbould J.'s findings in the Moyse Action were obiter and collateral to his decision;

2) Newbould J.'s findings are merely overlapping facts and are incidental to Catalyst's claims in the Current Action;

3) Catalyst may be entitled to a remedy without any inconsistent findings; and

4) The exercise of residual discretion favours not applying issue estoppel.

[29] I disagree and would reject this ground of appeal.

(b) Newbould J.'s Findings Are Not Obiter

[30] Catalyst submits that Newbould J.'s findings are in obiter and collateral because they were not necessary to his decision. For Catalyst, the central issue in the Moyse Action was whether Moyse passed confidential information to West Face and since Newbould J. found that Moyse had not, his other findings were collateral.

[31] I would reject this submission. Catalyst's submission is premised on the assumption that the only fundamental issue in the Moyse Action was whether Moyse passed confidential information to West Face. However, to succeed in its breach of confidence claim, Catalyst was also required to prove that West Face used confidential information in its bid for Wind and that this misuse caused detriment to Catalyst: Moyse ONCA Reasons, at para. 8.

[32] Canadian courts have consistently rejected the argument that a judicial finding is merely dictum or collateral because there was another sufficient basis for the judge's decision. In *Stuart v. Bank of Montreal* (1909), 41 S.C.R. 516, the Supreme Court rejected the argument that a judicial finding that is "a distinct and sufficient ground for its decision [is] a mere dictum because there is another ground upon which, standing alone, the case might have been determined": p. 534, per Duff J. (Fitzpatrick C.J. concurring), pp. 539-540, per Anglin J., quoting *New South Wales Taxation Commissioners v. Palmer*, [1907] A.C. 179 (P.C.), at p. 184. More

recently, the Federal Court of Appeal held that a judge's finding on one necessary element of a claim gave rise to issue estoppel even though the judge had earlier in his reasons reached a conclusion on another element that was sufficient to dispose of the claim: *Pharmascience Inc. v. Canada (Health)*, 2007 FCA 140, 282 D.L.R. (4th) 145, at paras. 34-35.

[33] As West Face submits, accepting Catalyst's argument would lead to absurd consequences, because it would make the applicability of issue estoppel dependent on the order in which the court chooses to address issues in its reasons. Baron Bramwell's statement in *Membery v. The Great Western Railway Co.* (1889), 14 App. Cas. 179 (H.L.), at p. 187, cited in *Stuart* by Anglin J. at p. 539, provides a complete answer to Catalyst's argument:

> Of course it is in a sense not necessary that I should express an opinion on this as the ground I have first mentioned, in my opinion, disposes of the case. But if, instead of mentioning that ground first, I had mentioned the one I am now dealing with, it would, on the same reasoning, be unnecessary to mention that. What I am saying is not obiter, not a needless expression of opinion on a matter not relevant to the decision. There are two answers to the plaintiff; and I decide against him on both; on one as much as on the other.

(c) Newbould J.'s Findings Are Central to the Current Action

[34] Catalyst further submits that Newbould J.'s findings are merely overlapping facts such that the same question was not determined. For Catalyst, the Moyse

Action was about confidential information that Moyse received and transmitted. In contrast, Catalyst submits that this action concerns the transmission of confidential information by VimpelCom and/or UBS to the Consortium in breach of the Confidentiality Agreement and the Exclusivity Agreement. As a result, it follows that Newbould J.'s finding that even if Moyse did pass on confidential information to West Face, and such confidential information did not cause detriment to Catalyst, it does not mean that confidential information that VimpelCom and/or UBS leaked to the Consortium did not cause detriment to Catalyst.

[35] I do not accept this argument. It is facially appealing. However, it is premised on a misunderstanding of what the parties put at issue in the Moyse Action.

[36] The Moyse Action necessarily concerned the overall conduct of West Face and the other Consortium members. As Catalyst had no direct evidence that Moyse gave West Face confidential information, it submitted that the court should infer from all the evidence that he did so: Moyse Trial Reasons, at para. 7. As Newbould J. recognized, this required the court to examine West Face's "overall course of conduct" to determine if there was a transfer of Catalyst's confidential information or if there were other explanations for West Face's conduct: Moyse Trial Reasons, at paras. 72-73. Therefore, whether West Face received any confidential information in breach of the Confidentiality Agreement and the

Exclusivity Agreement, and whether West Face's use of confidential information caused any detriment to Catalyst, were live issues at trial.

[37] Newbould J. was thus required to analyze whether the conduct of West Face and other Consortium members was consistent with the use of confidential information and whether there was any evidence that the use of confidential information caused Catalyst a detriment. He was entitled to draw inferences from the evidence as to what would likely have happened but for a misuse of confidential information: *Cadbury Schweppes Inc. v. FBI Foods Ltd.*, [1999] 1 S.C.R. 142, at para. 73. As the motions judge noted, West Face invited Newbould J. to make findings of fact that Catalyst failed to acquire Wind because it refused VimpelCom's demand for a break fee and because it would have been unable to obtain regulatory concessions. Catalyst did not object to any of these proposed findings of fact as being outside of the scope of the Moyse Action: Motions Reasons, at para. 40. In fact, Catalyst elicited considerable evidence on the dealings between VimpelCom and UBS, and the Consortium, and urged Newbould J. to make certain findings in respect of these dealings: Moyse ONCA Reasons, at para. 42. Catalyst cannot now complain that it was improper for Newbould J. to make contrary findings or that those contrary findings were not essential to his decision.

[38] I thus do not accept Catalyst's argument that Newbould J.'s findings on detriment were restricted to detriment from confidential information transmitted by

Moyse. Perhaps this would have been the case had Catalyst litigated the Moyse Action differently or had it produced direct evidence of leaks of confidential information by Moyse. However, Catalyst chose to put at issue not only the Consortium's entire conduct, but also the reasons why Catalyst failed to acquire Wind and whether misuse of confidential information by the Consortium had anything to do with that failure. As this court found, Newbould J. did not overstep his bounds in finding against Catalyst on these issues: Moyse ONCA Reasons, at paras. 39-42.

(d) Newbould J.'s Findings Would Bar Catalyst from Establishing Liability

[39] Catalyst submits that Newbould J.'s findings about why it failed to acquire Wind would not bar it from gaining a remedy for its claims. Catalyst argues that, even accepting Newbould J.'s findings, it is nonetheless entitled to recovery. I would reject this submission.

[40] In its argument, Catalyst focuses in particular on its claims against West Face, Globalive, and the US Investors for breach of confidence and inducing breach of contract. Relying on certain statements in *Cadbury Schweppes* that establish that the court has jurisdiction to grant a remedy dictated by the facts of the case rather than strict doctrinal considerations, Catalyst submits that it may be

entitled to equitable remedies such as an accounting of profits even if it suffered no financial loss.

[41] However, the jurisprudence is clear that a claimant must prove detriment to establish liability for breach of confidence, inducing breach of contract, and conspiracy: *Lysko v. Braley* (2006), 79 O.R. (3d) 721 (C.A.), at paras. 17-19; *Persaud v. Telus Corporation*, 2017 ONCA 479, at para. 26; *Cement LaFarge v. B.C. Lightweight Aggregate*, [1983] 1 S.C.R. 452, at pp. 471-472. There is no contradiction between this requirement to prove detriment and the passages from *Cadbury Schweppes* that Catalyst points to. *Lysko* explicitly accepted that *Cadbury Schweppes* adopted a broad definition of detriment but confirmed the requirement: paras. 18-19. Accordingly, Newbould J.'s findings would bar Catalyst from establishing the liability of West Face, Globalive, and the US Investors for breach of confidence, inducing breach of contract, and conspiracy.

[42] Nor do I accept that the fact that detriment is not required to establish liability for breach of contract changes my analysis. Catalyst did not plead breach of contract against West Face or the US Investors. Admittedly, Catalyst did plead breach of contract against Globalive. However, as I will explain later in these reasons, the motions judge correctly struck Catalyst's pleading of breach of contract against Globalive as disclosing no reasonable cause of action without leave to amend. Accordingly, Catalyst was required to prove detriment for each of

the causes of action it validly pled against West Face, Globalive, and the US Investors.

[43] Moreover, I do not place weight on the availability of alternative remedies. Catalyst did not plead any of the alternative remedies such as an accounting for profits that it now refers to on appeal. Instead, it repeatedly pled that the breach of confidence and inducement of breach of contract caused it to fail to acquire Wind. This is a precise inconsistency with Newbould J.'s findings.

[44] These inconsistencies also lead me to reject Catalyst's submission that the fact that it has pled different causes of action in the Current Action means issue estoppel cannot apply. Issue estoppel applies precisely when there are different causes of action as long as those causes of action have a material fact in common: *Danyluk*, at para. 54. For instance, in *Danyluk*, the claim to unpaid commissions was a material fact in both the administrative proceeding under the *Employment Standards Act*, R.S.O. 1990, c. E.14, and the civil claim for wrongful dismissal: para. 55. In the present case, the motions judge correctly identified that the need to prove detriment, namely that the respondents' conduct caused Catalyst to fail to acquire Wind, was a material fact common to the relevant causes of action Catalyst asserted in both actions.

[45] Lastly, I do not accept that issue estoppel cannot apply even in the face of Newbould J.'s findings because those findings simply overlap with the issues in

the Current Action and are not fundamental to his decision. Comparing the present case with the Supreme Court's decision in *Angle* illustrates that Newbould J.'s findings were not merely overlapping. *Angle* was a case involving merely overlapping facts. There, Dickson J. concluded that a finding that a shareholder was not under an obligation to pay a corporation for a benefit was not legally indispensable to the judgment in the prior tax proceeding as this indebtedness was only relevant to a subsidiary issue. There was no necessary inconsistency between the shareholder being obligated to pay the corporation and the decision that the shareholder had received a taxable benefit: pp. 255-256. In contrast, here Newbould J.'s finding that there was no chance Catalyst could have successfully concluded a deal with VimpelCom made it impossible for Catalyst to succeed on its breach of confidence claim in the Moyse Action. This finding similarly makes it impossible for Catalyst to succeed on its claims in the Current Action against West Face, Globalive, and the US Investors for breach of confidence, inducing breach of contract, and conspiracy without a court having to make inconsistent findings, as proof of loss is an element of those claims.

(e) Residual Discretion

[46] Catalyst argues that the motions judge erred in not exercising his residual discretion to permit Catalyst's action to proceed. Relying on *Danyluk*, Catalyst argues that the motions judge's analysis was cursory and that he erred in principle by failing to address the factors for and against the exercise of the discretion.

Catalyst submits that applying issue estoppel results in an injustice to Catalyst because there has been no discovery of VimpelCom or UBS regarding the circumstances surrounding the sale of VimpelCom's shares of Wind.

[47] I would not accept this argument. The court does have residual discretion, but its exercise is more limited in nature in this case because the Moyse Action was a court proceeding, not an administrative proceeding as in *Danyluk*: *Danyluk*, at para. 62. The passage in the motions judge's reasons where he explicitly referred to residual discretion was brief. However, his conclusion, at para. 75, that Catalyst failed to put its "best foot forward" and is not entitled to a "second bite at the cherry" was reasonable. It must be read in light of the motions judge's extensive reasons addressing Catalyst's failure to advance its current claims in the Moyse Action and its attempt to re-litigate Newbould J.'s findings in the Moyse Action.

[48] Finally, I am not convinced that the application of issue estoppel in these circumstances would work an injustice. In *Danyluk*, the court found such an injustice because the appellant's claim to employment commissions was never properly adjudicated due to procedural unfairness in the administrative proceedings the appellant pursued before commencing a civil action: para. 80. In contrast, in this case, Catalyst received a procedurally fair trial, the result of which this court upheld on appeal. While issue estoppel bars Catalyst from eliciting evidence and advancing new theories of liability against West Face, this is not a

manifest injustice since Catalyst could have elicited that evidence and advanced those theories in the Moyse Action.

(2) Did the motions judge err in dismissing the Current Action on the ground of cause of action estoppel?

(a) The Law

[49] The purpose of cause of action estoppel is to prevent the re-litigation of claims that have already been decided. As expressed by Vice Chancellor Wigram in *Henderson v. Henderson* (1843), 67 E.R. 313, at p. 319, it requires parties to "bring forward their whole case." The court thus has the power to prevent parties from re-litigating matters by advancing a point in subsequent proceedings which "properly belonged to the subject of the [previous] litigation".

[50] For cause of action estoppel to apply, the basis of the cause of action and the subsequent action either must have been argued or could have been argued in the prior action if the party in question had exercised reasonable diligence: *Grandview v. Doering*, [1976] 2 S.C.R. 621, at p. 638. That said, I accept Catalyst's submission that it is not enough that the cause of action could have been argued in the prior proceeding. It is also necessary that the cause of action properly belonged to the subject of the prior action and should have been brought forward in that action: *Hoque v. Montreal Trust Co. of Canada*, 1997 NSCA 153, 162 N.S.R. (2d) 321, at para. 37, leave to appeal refused, [1997] S.C.C.A. No. 656;

Pennyfeather v. Timminco Ltd., 2017 ONCA 369, at para. 128, leave to appeal refused, [2017] S.C.C.A. No. 279.

[51] Like issue estoppel, cause of action estoppel also requires a final judicial decision and that the parties to that decision were the same persons or the privies to the parties to the present proceeding: *Pennyfeather*, at para. 128; *Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 (C.A.), at para. 21, rev'd on other grounds, 2002 SCC 63, [2002] 3 S.C.R. 307. As these requirements were not seriously contested before us, I will not discuss them further.

(b) Catalyst Could Have Brought Forward its Claims in the Moyse Action

[52] Catalyst submits that cause of action estoppel should not apply because it could not have brought forward its current claims in the Moyse Action. In particular, Catalyst argues that it was barred from advancing its claim for inducing breach of contract in the Moyse Action. Newbould J., however, found that Catalyst was aware of its claim for inducing breach of contract by March 2015 and that it chose to "lie in the weeds" rather than assert its claim: *Mid-Bowline*, at para. 59. Catalyst never took steps to amend its pleadings in the Moyse Action to add a claim for inducing breach of contract in the Moyse Action even though West Face explicitly invited it to four months prior to the trial. This case is thus analogous to *Martin v. Goldfarb*, [2006] O.T.C. 629 (S.C.), where Perell J. applied cause of action

estoppel against corporate claims when the individual plaintiff had the opportunity to join the corporate claims to a previous individual action but failed to do so: at paras. 70, 78-79.

[53] Furthermore, I would reject Catalyst's argument that the possibility that new evidence would be obtained from VimpelCom and UBS regarding the sale of Wind in the Current Action means that cause of action estoppel should not apply. New evidence is only a basis to re-open litigation if it would "entirely chang[e]" the case and the party could not have reasonably ascertained it through reasonable diligence: *Grandview*, at pp. 636-637. Even assuming that the new evidence was so important as to entirely change the case, Catalyst could have ascertained this evidence through reasonable diligence in the Moyse Action. Catalyst knew of the facts underlying its claim for inducing breach of contract by March 2015. It thus had ample time to elicit this evidence at the trial of the Moyse Action. In *Grandview*, the plaintiff learned of a new theory of liability only following the trial of the first action, and the majority of the Supreme Court still applied cause of action estoppel: pp. 632-633. Here, the case for applying cause of action estoppel is even more compelling, as Catalyst was aware of its new theory of liability more than a year prior to the trial of the Moyse Action.

(c) Catalyst Should Have Brought Forward its Claims in the Moyse Action

[54] Catalyst's central argument on cause of action estoppel is that it was appropriate for Catalyst to advance its current claims in a new action rather than amending its pleadings in the Moyse Action. Catalyst submits that the focus of the Moyse Action was the leak of confidential information by Moyse. In contrast, the Current Action focuses on breaches of the Exclusivity and Confidentiality Agreements that West Face allegedly induced. The Current Action thus involves separate and distinct causes of action that flow from distinct legal relationships. Catalyst submits that the factors *Hoque* outlined to guide the court's determination of whether a party should have raised a matter in a prior proceeding show that Catalyst should not have advanced its current claims in the Moyse Action.

[55] I do not agree. In *Hoque*, at para. 37, Cromwell J.A. (as he was then) outlined several factors that are relevant to whether a matter should have been raised in a prior proceeding. These include the following:

1) Whether the second proceeding is a collateral attack against the earlier judgment;
2) Whether the second proceeding relies on evidence that could have been discovered in the past proceeding with reasonable diligence; and

3) Whether the second proceeding relies on a new legal theory that could have been advanced in the past proceeding.

[56] These three factors weigh against Catalyst in this case. As I have already found, the Current Action would require the court to make findings inconsistent with those of Newbould J. in order for Catalyst to establish liability for conspiracy, breach of confidence, and inducing breach of contract. It thus involves a collateral attack against Newbould J.'s trial decision. Moreover, as I have previously stated, the new evidence that Catalyst points to could have been discovered in the Moyse Action through reasonable diligence.

[57] The same is true of Catalyst's new legal theory that Globalive and UBS communicated confidential information to the Consortium and the Consortium used this information to induce VimpelCom to breach the Exclusivity and Confidentiality Agreements. I agree with Catalyst that its legal theory of causation in the Current Action is distinct from its theory of causation in the Moyse Action. However, I accept West Face's submission that this is analogous with *Grandview*, where the majority of the Supreme Court applied cause of action estoppel. In *Grandview*, the subject matter of both actions was that water flowed from the defendant's land onto the plaintiff's. Only the theory as to which way the water reached the plaintiff's land changed between the two actions. Similarly, in this case, the subject matter of both the Moyse Action and the Current Action is the

flow of confidential information to West Face. While Catalyst does have a different legal theory in this action, that theory only outlines a different means by which confidential information flowed to and was used by West Face.

[58] Nor am I persuaded that the different legal claims Catalyst has advanced in this action bar the operation of cause of action estoppel. I acknowledge that the existence of a "separate and distinct" cause of action is a factor that might weigh against applying cause of action estoppel: *Hoque*, at para. 37. However, as Sharpe J. (as he was then) held in *Las Vegas Strip Ltd. v. Toronto (City)* (1996), 30 O.R. (3d) 286 (Gen. Div.), at p. 297, aff'd (1997), 32 O.R. (3d) 651 (C.A.), the law does not permit the manipulation of the underlying facts to advance a new legal theory. Similarly, this court has held that cause of action estoppel bars "a subsequent lawsuit relating to the same loss being advanced on a different cause of action": *Lawyers' Professional Indemnity Co. v. Rodriguez*, 2018 ONCA 171, 139 O.R. (3d) 641, at para. 47, leave to appeal refused, [2018] S.C.C.A. No. 128 (Emphasis added).

[59] I find that Sharpe J.'s decision in *Las Vegas Strip* is analogous and confirms that cause of action estoppel should apply even though Catalyst has advanced distinct legal claims in the Current Action. In *Las Vegas Strip*, a strip club unsuccessfully argued that its operation was a legal non-conforming use under a municipal bylaw in a prior proceeding. The strip club then commenced a

subsequent proceeding alleging that the bylaw was invalid on municipal law and *Charter* grounds. Sharpe J. acknowledged that the strip club had raised "new legal arguments" in the second proceeding: p. 298. However, he found that it was barred from doing so because the prior proceedings put squarely in issue the same matter central to the second proceeding, namely the strip club's legal right to operate. The strip club was free to raise the municipal law and *Charter* arguments in the prior proceeding but elected not to do so: pp. 295-296. This court affirmed Sharpe J.'s decision on the same basis: p. 651.

[60] Similarly, in this case Catalyst was free to raise its inducing breach of contract and conspiracy claims in the Moyse Action but elected not to do so. I acknowledge, as Sharpe J. did, that Catalyst has raised new legal arguments. However, the motions judge reasonably concluded, at para. 78 of his reasons, that these new legal arguments arose from the same set of facts, namely Catalyst's failure to acquire Wind and its acquisition by the Consortium. Catalyst's current claims certainly sought to add certain facts related to VimpelCom and UBS's conduct and to subtract other facts related to Moyse's conduct. However, as Sharpe J. held in *Las Vegas Strip*, attempting to add or subtract facts does not change the reality that the underlying subject matter is the same and all of the facts were available in the earlier action: p. 297.

(3) Did the motions judge err in dismissing the Current Action as an abuse of process?

(a) The Law

[61] It is well-recognized that the re-litigation of issues that have been before the courts in a previous proceeding will create an abuse of process. As stated by the Supreme Court of Canada in *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77, at para. 52:

> [F]rom the system's point of view, relitigation carries serious detrimental effects and should be avoided unless the circumstances dictate that relitigation is in fact necessary to enhance the credibility and the effectiveness of the adjudicative process as a whole.

[62] The abuse of process doctrine applies to prevent the attempt to impeach a judicial finding by re-litigation in a different forum: *C.U.P.E.*, at para. 46. It is a flexible doctrine unencumbered by the mutuality of parties requirement that applies to issue estoppel and cause of action estoppel: *C.U.P.E.,* at para. 37. While abuse of process does include a finality requirement, that requirement is met in this case because the Supreme Court dismissed Catalyst's application for leave to appeal from this court's decision in the Moyse Action.

[63] The need to protect the integrity of the adjudicative functions of courts compels a bar against re-litigation: *C.U.P.E.*, at para. 43. If re-litigation leads to the same result, there will be a waste of judicial resources, and if it leads to a different result, the inconsistency will undermine the credibility of the judicial process:

C.U.P.E., at para. 51. The law thus seeks to avoid re-litigation primarily for two reasons: first, to prevent overlap and wasting judicial resources; and second, to avoid the risk of inconsistent findings: *Petrelli v. Lindell Beach Holiday Resort Ltd.*, 2011 BCCA 367, 24 B.C.L.R. (5th) 4, at para. 71; see also *C.U.P.E.*, at para. 51; Donald J. Lange, *The Doctrine of Res Judicata in Canada*, 4th ed. (Markham, ON: LexisNexis Canada Inc., 2015), pp. 217-218.

(b) The Current Action is an Abuse of Process

[64] The motions judge rightly concluded that Catalyst's Current Action was an abuse of process as against all respondents because the Current Action is an attempt to re-litigate the findings in the Moyse Action.

[65] Both of the concerns underlying the abuse of process doctrine are present here. Catalyst's claim is abusive both because: (a) it directly overlaps with the issues that were before the court in the Moyse Action; and (b) it can only be successful if the court rejects the findings made by Newbould J. For the reasons already outlined under issue estoppel and cause of action estoppel, Catalyst is trying to re-litigate Newbould J.'s factual finding that Catalyst's own actions caused its failure to acquire Wind. This is an abuse of process.

[66] Moreover, Catalyst's behaviour exhibits classic signs of re-litigation. Newbould J. found that Catalyst chose to "lie in the weeds" for strategic reasons and then to spring a new theory at the last moment: *Mid-Bowline Group*, at para.

59. Catalyst filed its statement of claim in the Current Action mere days before the trial of the Moyse Action. This is analogous to *Bear v. Merck Frosst Canada & Co.*, 2011 SKCA 152, 345 D.L.R. (4th) 152, where a law firm directed the commencement of a new class action merely a day after it exhausted its appeal processes of the dismissal of the previous class action. In that case, the Saskatchewan Court of Appeal found that there was nothing in the second class action that could not have been advanced in the first class action and that the law firm was attempting "to litigate by installment": paras. 76-78. Accordingly, the court found that the new class action was an abuse of process.

[67] Catalyst's submission that abuse of process is not intended to prevent the raising of a separate cause of action in a subsequent action should be rejected. As previously discussed, Catalyst could have raised the claims it advances in the Current Action in the Moyse Action. It elected not to. As this court recently held, abuse of process applies where issues "could have been determined" but were not: *Winter v. Sherman Estate*, 2018 ONCA 703, 42 E.T.R. (4th) 181, at para. 7. Moreover, it also applies to prevent re-litigation of previously decided facts: *Winter*, at para. 8. As previously stated, for Catalyst to succeed in the Current Action, a court would have to reach different factual findings from those of Newbould J. on the reasons why Catalyst failed to acquire Wind.

[68] Moreover, none of the factors the Supreme Court outlined in *C.U.P.E.* that would permit re-litigation apply in this case. The Supreme Court stated, at para. 52, that it might be appropriate to permit re-litigation in the following circumstances:

1) When the first proceeding is tainted by fraud or dishonesty;

2) When fresh, new evidence, previously unavailable, conclusively impeaches the original results; or

3) When fairness dictates that the original result should not be binding in the new context.

[69] Catalyst does not allege that the first proceeding is tainted by fraud or dishonesty. To the extent that there is a possibility that new evidence from VimpelCom and UBS regarding the sale of Wind might impeach the original results, this evidence was not previously unavailable and could have been adduced by Catalyst at the trial of the Moyse Action. As for the fairness factor, the Supreme Court clarified that this would apply if the stakes in the original proceeding were too minor to give a party an adequate incentive to litigate: *C.U.P.E.*, at para. 53. However, the financial stakes in the Moyse Action were not minor and Catalyst robustly litigated that proceeding.

[70] Catalyst's reliance on Goudge J.A.'s dissenting reasons in *Canam*, which the Supreme Court subsequently upheld, is misplaced. *Canam* is distinguishable

on the facts because it concerned a claim that a party could not have raised in prior proceedings, not one which a party could have raised but chose not to. In *Canam*, a purchaser first sued the vendor in contract. The court found that there had been a misrepresentation by the vendor's realtors but dismissed the purchaser's claim because of the doctrine of merger. The purchaser then sued its lawyer in tort for professional negligence. The lawyer commenced third party proceedings against the realtors in which he sought to add them as joint tortfeasors for their misrepresentations to the purchaser. As neither the lawyer nor the realtor were parties to the purchaser's original contractual action against the vendor, Goudge J.A. found that the lawyer was not attempting to re-litigate a claim because he had not and could not have raised this issue previously: para. 58. In contrast, in this case Catalyst could have raised its claims in the Current Action but elected not to do so.

(4) Did the motions judge err in striking Catalyst's pleadings of breach of contract against UBS and Globalive without leave to amend?

[71] The motions judge struck Catalyst's pleadings of breach of contract against UBS and Globalive without leave to amend. Catalyst makes two submissions. First, it argues that the motions judge erred in striking the pleadings because Catalyst did plead all elements of privity of contract against both Globalive and UBS. Second, Catalyst submits that the motions judge should have granted leave

to amend because an amendment could have cured any deficiencies without incompensable prejudice to the respondents.

[72] I do not agree.

[73] First, the motions judge correctly concluded that the pleadings did not disclose a reasonable cause of action because they failed to plead privity of contract. A claim for breach of contract must contain sufficient particulars to identify the parties to the contract: *McCarthy Corporation PLC v. KPMG LLP*, [2007] O.J. No. 32 (S.C.), at para. 26. Similarly, it is trite law that, subject to certain exceptions that are not applicable here, a non-party to a contract cannot be sued for breach of contract: *Greenwood Shopping Plaza Ltd. v. Beattie*, [1980] 2 S.C.R. 228, at pp. 236-238.

[74] As the motions judge found, Catalyst failed to plead that either Globalive or UBS were parties to the Exclusivity Agreement or the Confidentiality Agreement. Catalyst's statement of claim listed the parties to each agreement without including either Globalive or UBS. While Catalyst did plead that UBS was "bound" by these agreements, the motions judge correctly concluded that as a matter of law UBS could not be bound to an agreement to which it was not a party in these circumstances. With respect to Globalive, the motions judge found that the claim must also fail. Catalyst's theory is that Globalive is vicariously liable for the actions of its principal, Anthony Lacavera ("Lacavera"), who Catalyst in turn pleads was

bound not to undermine the Exclusivity Agreement. However, Catalyst pleads that Lacavera was not a party to the Exclusivity Agreement, so this claim similarly fails.

[75] Second, the motions judge's decision to deny leave to amend was reasonable. The decision whether or not to grant leave to amend is a discretionary decision entitled to deference: *RWDI Air Inc. v. N-SCI Technologies Inc.*, 2015 ONCA 817, at para. 14. The motions judge denied leave to amend both pleadings because Catalyst had many opportunities to properly plead its breach of contract claims and since the absence of any contract between Catalyst and Globalive or UBS meant that no amendments could make the pleading legally tenable. Both of these findings are consistent with jurisprudence establishing that a court may deny leave to amend where a party has had many opportunities to properly plead the claims and where amendments could not make the pleadings legally tenable: see *Cavanaugh v. Grenville Christian College*, 2013 ONCA 139, 360 D.L.R. (4th) 670, at paras. 82-83; *RWDI*, at para. 14.

CONCLUSION

[76] In all the circumstances, I would dismiss the appeal.

[77] With respect to the issue of costs, the parties agreed that should the disposition of this appeal be in favour of the respondents, then they should be awarded their costs collectively fixed in the amount of $300,000. Accordingly, costs

are hereby awarded to the respondents collectively, fixed in the mount of $300,000, inclusive of all taxes and disbursements.

Released: MAY - 2 2019

J.A.

I agree M. L. Benotto J.A.

Lauren Sauvé/Hourigan J.A.